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IN THE

Supreme Court of the United States

OCTOBER TERM 1983

CHRISTOPHER L. LOWE, ET AL.,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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[redacted] BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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CHRISTOPHER L. LOWE, ET AL.

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SECURITIES AND EXCHANGE COMMISSION,

Respondent.

MOTION BY THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The American Civil Liberties Union respectfully requests leave to file the attached brief in this case as *amicus curiae*.[1]

[1]A partner of counsel for *Amicus* is personally disqualified from participation in this case by virtue of prior service with the Respondent. He and the firm have, consistently with DR 9-102 of the Code of Professional Responsibility of the District of Columbia Bar, filed letters with the Parties which attest to the firm's procedures to screen the disqualified partner from any participation in the case. The firm has been advised orally by the Parties that they do not object to the firm's representation of the *amicus curiae*.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit organization with over 200,000 members. The ACLU has been dedicated for over 60 years to the protection of personal liberties through defense of the civil liberties embodied in the Bill of Rights. One of the major thrusts of the ACLU's efforts has been the protection of the First Amendment guarantees of freedom of speech and freedom of the press.

To this end, the ACLU and its local affiliates appear frequently in the United States District Courts, Courts of Appeal, and the Supreme Court as counsel of record or as *amicus curiae* in First Amendment cases. *See, e.g., Valentine v. Chrestensen*, 316 U.S. 52 (1942); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Through those appearances, they have developed substantial expertise in this area of the law.

This case is of great concern to the ACLU. The Petitioners and Respondent urge that resolution of this case requires the Court to address serious and substantial First Amendment questions concerning the licensing provisions of the Investment Advisers Act of 1940, 15 U.S.C. § 80b-1, *et seq*. In the view of the ACLU, a less confrontational analysis is available. It offers, through this brief, a statutory avenue to a just and constitutional resolution of this case not presented by the parties: an exemption from the Advisers Act applicable to Petitioners. If, however, the Court believes that it must or should attempt to resolve whether the Advisers Act poses a degree of regulatory infringement on speech and the press that is permissible under the First Amendment, the ACLU addresses that issue as well.

For the foregoing reasons, the ACLU respectfully requests that this motion be granted and the attached brief be filed. Counsel for Petitioners and Respondent have orally advised Counsel for the ACLU that they will consent to its filing of a brief *amicus* by the ACLU.

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INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

Respondent seeks to forbid Petitioner from publishing an investment newsletter and from operating a telephone "hot line" of recorded messages containing investment information because Petitioner was, in 1977 and 1978, convicted of crimes relating to the conduct of an investment advisory business.

Respondent argues that, given Petitioner's criminal record, he is disqualified from serving as an "investment advisor" within the meaning of the Investment Advisers Act, 15 U.S.C. § 80b-1 (the "Advisers Act") and, therefore, may not publish or disseminate investment information to the general public through the medium of newsletters or the maintenance of recorded telephone messages.

Respondent's position rests upon two flawed assumptions: First, that publication and sale of newsletters containing investment information is the equivalent of rendering investment advice within the meaning of the Advisers Act; and, second, that the government may forbid the publication of newsletters directed to the general public whenever it may forbid face-to-face advisory activity.

In fact, the Advisers Act exempts from its coverage "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." Section 202(a)(11)(d), 15 U.S.C. § 80b-2(a)(11)(d). However, even if the publication of an investment newsletter falls within the Advisers Act, the First Amendment forbids the imposition of an absolute prior restraint on publication which is keyed, not to the allegedly harmful nature of a

particular statement, but to the past activities of the speaker.

ARGUMENT

I. Congress Did Not Intend That Persons Such As Petitioners Should Be Subject to the Advisers Act

The legislative findings in Section 201 of the Advisers Act, 15 U.S.C. § 80b-1, as well as the definition of investment advisers in Section 202(a)(11) of the Advisers Act, 15 U.S.C. § 80b-2(a)(11), indicate that Congress intended to regulate any person, not otherwise exempted, "who for compensation, engages in the business advising others, . . . *through publications* . . . or who, for compensation and as part of a regular business, issues or *promulgates analyses or reports* concerning securities. . . ." (Emphasis added).

However, Congress also intended to reduce, if not altogether avoid, conflict between the Advisers Act and the First Amendment by including among those who were specifically exempted from the Advisers Act "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." Section 202(a)(11)(D), 15 U.S.C. § 80b-2(a)(11)(D). The parties to this case all appear to assume that this "publishers' exemption" is inapplicable. The ACLU believes that their assumption is incorrect.

A thorough review of the legislative history of the publishers' exemption suggests that its application to Petitioners is more likely than the parties have assumed.[2] In addition, ACLU urges the Court to treat the publishers' exemption with great care so as to give maximum effect to the obvious intent of the Congress to avoid through the publishers' exemption, if not in this case then certainly in many others,[3] precisely the kind of constitutional confrontation urged upon it in this case. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979); *International Association of Machinists v. Street*, 367 U.S. 740 (1961).

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[2]The Court below avoided the publishers' exemption by adopting, as its own, a test of the exemption found in *SEC v. Wall Street Transcript Corp.*, 422 F.2d 1371, 1378 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970), a *subpoena* enforcement case not raising the prior restraint issue: "whether or not a specific publication is engaged in practices which the [Advisers] Act was intended to regulate" and by the bald assertion that bona fide newspapers are not within the "regulatory interest." 422 F.2d at 1372. Such tests, however, are circular. They eviscerate both the publishers' exemption and the First Amendment concerns that underlie the exemption. If a publisher engaged in no practices the Advisers Act was intended to regulate, that publisher would have no need for the publishers' exemption. Clearly, a court must look outside that circle for guidance. Otherwise the only rationale revealed by the opinion below, for enforcement of this otherwise classic infringement on the constitutional freedom of the press from Congressional abridgement, is that Congress passed a statute. That rationale simply cannot suffice.

[3]Several other cases, resolvable in whole or in part by the publishers' exemption are now pending, including one, *Wall Street Publishing Institute, Inc. v. SEC*, No. 84-5485 (D.C. Cir.), which has been stayed pending the Court's resolution of this case. *See also SEC v. Financial News Association*, Civil Action No. 84-0878-A (E.D. Va.) and *SEC v. Options Strategy Associates, Ltd.*, Civil Action No. 84-4316 (S.D.N.Y.)

When the 1940 Congress enacted the Advisers Act it foresaw the potential for conflict between the freedom of the press and unyielding regulation of investment advice transmitted through the printed media. Specifically, the 76th Congress was quite aware of the potential for abuses by publishers of the general type it otherwise sought to foreclose through the Advisers Act, but concluded for constitutional, legal and practical reasons to forego licensing or regulation of the content or editorial practices of publishers through the Advisers Act. It did this through the publishers' exemption.

The Advisers Act was the end result of a study mandated by Congress five years earlier. Section 30 of the Public Utility Holding Company Act of 1935 authorized and directed the SEC to study investiment trusts and companies "and to report the results of its study and its recommendations to the Congress. . . ." Ch. 687, 49 Stat. 803, 837 (1935), 15 U.S.C. § 79(2)-4 (1982). That "Investment Trust Study" was run, for the most part, by its Chief Counsel, David Schenker. He became the *de facto* author of both the Advisers Act and the accompanying Investment Company Act of 1940, Ch. 686, 54 Stat. 789 (1940) (codified as amended at 15 U.S.C. § § 80a-1, *et seq.* (1982)). He was also the principal SEC witness throughout the hearings conducted jointly with respect to both bills.

The floor discussion germane to the publishers exemption consisted of little more than a summary by the respective sponsors (Senator Wagner and Congressman Lea) of the then proposed language of the publisher's exemption with-

out further comment.[4] The references in the Committee reports are similar and neutral. However the intended relationship between the publishers' exemption and the Congress' First Amendment concerns was elsewhere made clear. Mr. Schenker, who was the *de facto* author of at least the originally introduced version of the Advisers Act and

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[4]As initially introduced on March 14, 1940, the publishers' exemption was limited to "the publisher of any bona fide newspaper or newsmagazine of general circulation." S. 3850 and H.R. 8935, 76th Cong., 3d Sess., § 45(a)(16)(c) (1940). In this version, the text of the exemption was set forth in the general definition section (§ 45) of the accompanying bill proposing an Investment Company Act and merely incorporated by reference in proposed Section 203 of the proposed Advisers Act. That draft was expanded on June 6, 1940, to include two additional concepts: (1) business and financial publications; and (2) the notion of regularity of publication. Committee Prints of S. 3850 and H.R. 8935, 76th Cong., 3d Sess., June 6, 1940. As then revised, it read, as it did when enacted: "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." While the June 6th revision obviously expanded the exemption, nothing in the floor discussion explains the rationale for the choice of words, nor indeed for the phrasing of any version of the exemption. As to the phrase "bona fide," which was not considered below to be dispositive, the ACLU does not believe the Congress intended the phrases to be translated as "good faith," its literal meaning. A construction of the phrase more consistent with the draftmen's intent, and with constitutional principles, would be "genuine." Given this construction, the Congress can be seen to have attempted to distinguish a publication that genuinely was generally and regularly circulated by one engaged in the publishing business, and thus within the traditional umbra of the constitutionally protected press, from private communications between advisers and their clients, dressed up to appear to be newspapers, news magazines or business or financial journals.

the principal SEC witness on the legislation, sought and obtained permission to place in the record of the Senate Hearings two related memoranda provided for the Investment Trust Study by the Research Department of the Illinois Legislative Counsel.[5] The first memorandum surveyed the regulation of "investment counselors" among the States; the second, entitled "Statutory Regulation of Investment Counselors", summarized the principal practical, legal and constitutional issues thought to be involved in regulating investment advisers.

Reproduced below are the most germane sections of the memorandum that addressed the problems then foreseen were the Congress to elect to regulate publishers of investment advice. This text evidences that the SEC which submitted the memorandum as evidence of its own thinking, as well as the Congress, were quite aware of abuses, past and potential, by publishers of investment information and advice, as such, but that a variety of practical, legal and constitutional problems led both the SEC and the Congress to conclude that it was at least wise, and probably constitutionally essential, to provide a broad exemption for publishers from the Advisers Act:

> *"Publishers of Investment Advice*
>
> A particular problem in defining the application of a law regulating investment counselors arises from the existence of individuals and firms who furnish invest-

[5] *Hearings on Investment Trusts and Investment Companies, S. 3580 before a Subcommittee of the Senate Committee on Banking and Currency*, 76th Cong., 3d Sess., 1004-1016 (Apr. 26, 1940) (hereinafter "Hearings").

> ment advice solely by means of publications. Insofar as such individuals and firms also render specialized advice to individual clients, they might be subject to any regulatory measure that may be adopted. The question arises, however, as to whether or not services which give the same general advice to all their clients, by means of some circular or other publication, are actually engaged in a type of investment counseling as to which regulation is feasible.
>
> * * *
>
> These investment services which function through publications sent to their subscribers, rather than through individualized advice, would present several difficulties not found in regulating investment counselors generally. In the first place, the large number of agencies publishing investment facts and interpretations is well known, and a very large administrative staff would be required to enforce detailed regulation. Secondly, such information is supplied both by newspapers and by specialized financial journals and services. The accepted rights of freedom of the press and due process of law might prevent any general regulation and perhaps also supervision over particular types of publications, even if the advertisements of these publications occasionally quite exaggerate the value of the factual information which is supplied. That the constitutional guarantee of liberty of the press is applicable to publications of all types, and not only to newspapers, has been clearly indicated by the United States Supreme Court in the following terms:

'The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historical weapons in defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press, in its historical connotation, comprehends every sort of publication which affords a vehicle of information and opinion.' [Citing *Lovell v. City of Griffin*, 303 U.S. 444 (1938).]

To the problem of formulating reasonable and practicable regulations for the factual services must, accordingly, be added legal and constitutional difficulties inherent in the attempted regulation of any individual or organization functioning primarily by means of published circulars or volumes. However, liberty of the press is not an absolute right, and some types of regulation may be both constitutional and feasible, assuming that regulation of some sort is thought desirable. *Such regulation could probably not legally take the form of licensing publications or prohibiting certain types of publications. Regulation of the publishing of investment advice in order to conform with constitutional requirements, would probably have to be confined to punishing, by civil or criminal penalties, those who perpetrate or attempt to perpetrate frauds or other specific acts declared to be contrary to law.*[6]

* * *

[6]Hearings at pp. 1008–1009. (Emphasis added, footnotes omitted.)

Finally, in the memorandum's self-described "Summary" appears the observation:

> In the case of so-called investment counselors who function only by means of publications, a special problem would arise with regard to possible regulation. It would be necessary to develop a type of regulation which would not violate accepted principles of freedom of the press.[7]

Accordingly, it seems quite clear that the 76th Congress considered the publishers' exemption to be precisely that, an exemption from the licensing requirement of sufficient breadth to preclude raising First Amendment issues. This then leads, the ACLU submits, to an inquiry into what the 76th Congress understood those issues to be: its understanding of freedom of the press in 1940.

When Congress enacted the Advisers Act, its concept of what was protected by the First Amendment's press guarantees was largely, if not entirely, defined by *Near v. Minnesota ex re Olson*, 283 U.S. 697 (1931), *Lovell v. City of Griffin*, 303 U.S. 444 (1938) and *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Both *Lovell*, cited and quoted from in the memorandum *supra*, and *Cantwell* rejected on First Amendment grounds licensing requirements as applied to religious publications, *Cantwell* in the commercial context of "fraud." Although *Near* did not involve licensing as such, the Court noted therein that the First Amendment grew out of the experience in England of abuses of the "licensor." 283 U.S. at 713.

[7]*Id.* at 1015–1016.

An additional historic observation is relevant to the search for the understanding of the 76th Congress about the First Amendment. That observation is this. The Advisers Act was enacted two years before the Supreme Court in *Valentine v. Chrestensen*, 316 U.S. 52 (1942), first articulated the "commercial speech doctrine." So that if, consistent with the Court's longstanding approach to constitutional cases, the Court's first effort should be to divine the intent of the 76th Congress legislating in 1940 so to avoid a needless collision between the Advisers Act and the First Amendment's protection of freedom of the press, the subsequently developed doctrine of commercial speech could well be deemed irrelevant.

A strong case can therefore be made that Petitioners are within the publisher's exemption. Their publications are available to all who wish to subscribe to them. While they apparently do provide advice with respect to identified securities, the advice is general in that it is not tailored to the investment portfolios or objectives of particular subscribers. The parties appear to dispute the regularity of the advice but, as the District Court noted, any irregularity is likely a function of their continuing battles with the government. Most important, as noted above, in assessing whether the publishers' exemption is applicable here, the Court should recognize that a liberal interpretation of the exemption is consistent with the intent of Congress to avoid constitutional conflict.

II. Assuming Petitioners Are Not Exempt From the Advisers Act, the Broad Prior Restraint imposed on Petitioners Under the Advisers Act Exceeds Constitutional Boundaries

As the parties have presented this case thus far, it poses a series of formidable constitutional issues related to (1) commercial speech, (2) commercial activity in which expression is an essential component and (3) the extent to which the Advisers Act's authorization of a prior restraint is permitted in either case. The ACLU believes that (1) commercial speech is not at issue here, (2) commercial activity in which speech is an essential component is the proper analytic rubric, (3) but that in either event, tested solely on First Amendment grounds, the broad prior restraint imposed upon Petitioners by operation of the Advisers Act, exceeds that necessary to protect the governmental interest and is thus constitutionally infirm.

A. Petitioners' Newsletters and Hotline Do Not Constitute Commercial Speech

As just noted, it was in 1942, two years after the enactment of the Advisers Act, that this Court concluded for the first time, and without citation, that there is a type of expression susceptible of being characterized as "commercial" and that such "commercial speech" is not entitled to the full protection the First Amendment affords to "political speech." *Valentine v. Chrestensen*, 316 U.S. 52 (1942). Having drawn that distinction, the Court has since faced the inevitable, continuing burden of defining "commercial speech."[8]

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[8]The Court has itself acknowledged its historic difficulty with the *Valentine* notion. *See Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.* 425 U.S. 748, 759–761 (1976). In the last ten years, this Court alone has found it necessary to define the nature of and the constitutional protection afforded "commercial speech" in no fewer than nine cases. See note 9, *infra*.

At this writing, it appears reasonably settled that purely commercial advertising is commercial speech.[9] However, Petitioners' newsletters and hotline clearly are not mere advertising. Their content consists of consumer information and advice. There is no evidence to suggest that Petitioners are paid by the subjects of the advice to advertise, sell or promote the sale of the securities analyzed in the newsletter or hotline. The Court has also said that commercial speech includes communications which do no more than simply propose a commercial transaction, presumedly between the parties to the proposed transaction.[10] Petitioners' activities clearly do not fit that definition either. There is no evidence to suggest that Petitioners are purchasers, sellers, issuers, underwriters, or brokers with respect to the securities about which they inform and advise their subscribers.

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[9]*See Virginia Pharmacy Board v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748 (1976); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (advertising contraceptives); *In re R.M.J.*, 455 U.S. 191 (1982) (advertising legal services); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (advertising on billboards); *Central Hudson Gas & Electric Corp. v. Public Service Commission*,447 U.S. 557 (1980) (advertising electrical power); *Friedman v. Rogers*, 440 U.S. 1 (1979) (use of trade name in advertising optometric services); *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (proposal to provide legal services for profit); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (advertising legal services); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 1977 (advertising houses); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (advertising abortions); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) (advertising jobs).

[10]*Bolger v. Youngs Drug products Corp.*, 463 U.S. 60 (1983); *Virginia Pharmacy Board v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975); *Pittsburgh Press Co. v. Pittsburg Commission on Human Relations*, 413 U.S. 376, 385 (1973).

Accordingly, since Petitioners' activities do not fall within either of the accepted tests of commercial speech, Respondent urges an expansion of the "commercial speech doctrine" to include more than advertising, more than communications between buyer and seller proposing a transaction. Respondent has looked for support to a phrase the Court has used on at least two occasions in recent years: "expression related solely to the economic interests of the speaker and its audience" to describe commercial speech.[11] That description, however, is not the holding of any case. Moreover, the description has disabling infirmities as the definition of a category of lesser protected speech.

A significant number of activities and enterprises long deemed entitled to the full panoply of First Amendment protections could be described as communications related solely to commercial or economic interests. These include such specialty magazines as *Consumer's Reports* and the *Kiplinger Letter*, such television programs as *Wall Street Week*, and such important elements of the general print media as the *Wall Street Journal* and the financial sections of most major daily newspapers and innumerable magazines. Probably for that reason, the Court recently did not apply the commercial speech doctrine in a First Amendment case involving precisely the kind of published commercial advice rendered to subscribers that is present here. *Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949 (1984).

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[11]*Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 561 (1980); *In Re R.M.J.*, 455 U.S. 191, 204 n.17 (1982).

Experience teaches that distinctions susceptible of being drawn between publications on the basis of their "political" or "commercial" character, are too facile to serve as First Amendment doctrine. *See Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). More than one contemporary political contest has been affected by such intrinsically *commercial* concerns as the extent to which automobiles of foreign import, rather than those domestically produced, are widely purchased and sold. To treat communications that evaluate automobiles such as *Motor Trend Magazine* and others, as lesser protected commercial speech would, therefore, do undue violence to the First Amendment.

Stripped of peripheral features so as to reveal their constitutional skeleton, Petitioners newsletters and hotline are publications of factual information, opinion and recommendations to an audience that petitioners restrict to those who pay for such information, opinions and recommendations ostensibly to help them make commercial (investment) decisions. Too much communication worthy of full First Amendment protection falls into that category. Accordingly, while, as the Court noted in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), it may be too much or too late to suggest that the commercial speech doctrine should never have been articulated, experience suggests that the Court has wisely restricted its scope. It would be unwise to disregard the extent to which the expansion of the doctrine urged by Respondents would measurably increase the burden of its application and the danger of its misapplication. As the Court noted in *Virginia Pharmacy:*

> "So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered." *Virginia Pharmacy*, 425 U.S. 765 (citations omitted).

Accordingly, the ACLU urges the Court not to expand the reach of the commercial speech doctrine to deprive speeches and publications of their full First Amendment protection either because they are only provided to subscribers, or because their content is essentially commercial, or both. The cost of such an expansion of the commercial speech doctrine will be to burden the first Amendment and this Court with the continuing need to define and measure an encroachment on press and speech freedoms not consistent with our constitutional history, nor required to protect the regulatory interests reflected in the Advisers Act.

B. Even if Petitioners Newsletter and Hotline Constitute Mere Components of Speech Incidental to Commercial Activities, the Prohibition on All Publishing by Petitioners Constitutes an Excessive and Thus Impermissible Prior Restraint

The second theory asserted by Respondent in response to Petitioners' First Amendment assertions rests on the line of cases that permit regulation of commercial activity, including the practice of professions, in which speech and publication "is an essential but surordinate component." *Ohralik v.*

Ohio State Bar Association, 436 U.S. 447, 457 (1978). The ACLU believes that this theory is a reasonable way to analyze the First Amendment interest in Petitioners' publications and speech.

The Court has long recognized a strong governmental interest in the protection of consumers through, *inter alia*, the establishment and maintenance of standards among the licensed professions. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 460 (1978) (lawyers); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978) (engineers); *Virginia Pharmacy Board v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748, 766 (1976) (pharmacists); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955) (opticians); *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935) (dentists).

Accordingly, *amicus* assumes that Petitioner's past criminal activity would justify Respondent's refusal to permit Mr. Lowe to engage in face-to-face investment advisory activity. *Ohralik v. Ohio State Bar Association*, *supra*. However, merely because the power to regulate face-to-face commercial activity exists, the government does not necessarily possess the power to impose an absolute prior restraint on the publication of a newsletter aimed at the public. As a comparison of *Ohralik* with *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) and *In re Primus*, 436 U.S. 412 (1978) reveals, the power to regulate face-to-face activity does not automatically carry with it the power to forbid activity with more substantial First Amendment connections and less substantial risk to governmental interests. Whatever the government's power to regulate face-to-face conduct, Respondent lacks the power to impose an absolute prior restraint on Petitioner's newsletter premised, not on its contents, but on his past activity.

The ban on prior restraints is the most significant protection imposed by the First Amendment on government attempts to restrict the flow of information. *See, e.g., Near v. Minnesota*, 283 U.S. 697 (1931); *United States v. New York Times Co.*, 403 U.S. 713 (1971); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). While disputes have arisen over the scope of the government's power to obtain a prior restraint in both commercial and noncommercial contexts, the cases have uniformly arisen as a result of government claims that a particular communication will cause so much harm that the government is entitled to seek to prevent the harm by preventing the speech. As cases like *United States v. New York Times*, *supra*, and *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) demonstrate, the burden of proving insufficient harm to justify the prior restraint of a given message is extremely high.

This case, however, does not involve an attempt to restrain a particular message. Rather, the government seeks a prior restraint on a newsletter based, not on the allegedly harmful nature of its contents, but solely on the status of its publisher. Whatever the government's very limited power to seek prior restraints based on the harm flowing from the content of a given communication, no power exists to impose a prior restraint based on the status of a speaker.[12] If there is

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[12]The Court has confirmed that the First Amendment protects the rights of prisoners to communicate, *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *Procunier v. Martinez*, 416 U.S. 396, 412 (1974), and even where the Court has recognized limits to the First Amendment rights of those incarcerated for crimes it has carefully evaluated the necessity of the regulatory limits. *Jones v. North Carolina Prisoners' Labor Union Inc.*, 433 U.S. 119 (1977).

any absolute in the Constitution, it is an absolute ban on prior restraints based on a speaker's past acts. *Near v. Minnesota*, *supra* (prior restraint on future publication based on past acts unlawful).

Of course, to argue that Respondent may not impose a prior restraint on Mr. Lowe based solely on his past acts, is not to suggest that the public may not be effectively protected from the possibility of fraudulent information. Numerous alternatives short of an absolute prior restraint are available to the SEC including (1) enforcement of the antifraud provisions of Sections 206, 208 and 209 of the Advisers Act, 15 U.S.C. § 80b-6, 8 and 9, and (2) the device noted with approval in *Virginia Pharmacy*, 425 U.S. at 772, n.24, *Central Hudson*, 447 U.S. at 365 and *Bates*, 433 U.S. at 384, to wit: a required disclosure to Petitioners' subscribers that warns them of the Petitioner Lowe's criminal record arising from conduct relating to investment advisory activities. Elsewhere in the federal securities laws, Congress and the Respondent have chosen precisely that disclosure approach to deal with persons previously convicted or found responsible in civil enforcement proceedings for misconduct relevant to their activities in the securities industry. See Regulation S-K, Item 401(f)(2), C.F.R. § 240.401(f)(2) (1984). The Respondent offers no reason why that lesser imposition will not suffice here.

Accordingly, the ACLU submits that the prior restraint imposed here exceeds constitutionally permissible limits.

CONCLUSION

This case does not require, nor should the Court proceed as though it does, resolution of such general questions as the scope of the commercial speech doctrine or the propriety of the restraint that the parties believe to be imposed on Petitioners under the Advisers Act. Petitioners are exempt from the Advisers Act licensing requirements under the publishers' exemption. The ACLU urges affirmance of the order below on that ground alone.

Respectfully submitted

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